

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 6 OF 2005

Mr. Shailesh H. Bajaj
residing at 24/25,
Bharatiya Bhavan,
72, Marine Drive,
Mumbai – 400 020.

..... Petitioner

V e r s u s

1. Sesa Goa Limited
a Company incorporated
under the Companies Act, 1956
having its registered Office
at Sesa Ghor,
20 EDC Complex Patto,
Panaji – Goa, 4030001
(Represented by Mr. D. K.
Chodankar Manager – Legal).

2. State of Goa,
Through P.P.
Panaji – Goa.

..... Respondents

Shri V. A. Lawande, Advocate for the Petitioner.

Shri R. G. Ramani, Advocate for the Respondent no.1.

CORAM: N. A. BRITTO, J.

DATE: 27th April, 2006

JUDGMENT

The petitioner herein is an accused against whom process has been issued, upon a complaint filed by respondent no.1, under Section 447 and 504 of I.P.C. and now is before this Court, invoking extraordinary jurisdiction under Articles 226, 227 of the Constitution of India and Section 482 of the Code of Criminal Procedure, 1973, and praying that the proceedings in the said Criminal Case no. 147/04/C be quashed.

2. The petition was admitted by Order dated 03.08.2005 and therefore requires to be now disposed of, though it has been held by this Court that an Order issuing process is revisable by the Court of Sessions, by Judgment dated 06.04.2005 in Criminal Miscellaneous Application No. 54/05 (at Goa) and by Judgment dated 8/21.06.2005 in Criminal Miscellaneous Application No. 550/2005 (at Bombay). It is well settled that when there is efficacious alternate remedy, a writ petition generally ought not to be entertained. That is a self imposed limitation.

3. Some facts are required to be stated to dispose of this petition.

4. The petitioner is the son and attorney of his mother who is the share holder of the Complainant which is a Company. A complaint bearing no. 4/S/2000 came to be filed before the 14th Court at Girgaum at Bombay, against the Directors of the Complainant's subsidiary and with a view to assist the service of summons issued in the said case, the petitioner accompanied by one Constable came to serve the said summons on one of the Directors of the Complainant - namely Mr. Mukherji at their office situated at Patto, Panaji. It is stated by the petitioner that he had taken a pass to enter the said office but it is the allegation of the Complainant that one Mr. Chodankar and one Mr. Muzawar, had accompanied the said police personnel to the cabin of Mr. Mukherjee and no sooner did the police personnel and Mr. Chodankar and Mr. Muzawar entered the cabin of Mr. Mukherjee, the petitioner/accused violently pushed the door of Mr. Mukherjee's cabin and despite Mr. Mukherjee's request not to enter his Cabin, barged into his Cabin and in an insulting manner pointed a finger at Mr. Mukherjee and shouted looking at the police personnel that the person he was pointing at was Mr. Mukherjee and when Mr. Mukherjee requested the petitioner/accused to move out of his cabin, the accused refused to come out and continued to stay there with an intention to insult and annoy Mr. Mukherjee and started defiantly arguing with Mr.

Mukherjee. The Complainant further alleged that Mr. Muzawar went to the accused and requested him to go out of the cabin and the accused told Mr. Muzawar to mind his own business and then the security personnel of the Complainant were summoned but by the time the security personnel came, Mr. Muzawar succeeded in taking the accused out of the cabin of Mr. Mukherjee. The allegation of the Complainant was that the accused by entering into the cabin of Mr. Mukherjee, with intent to insult and/or annoy him and thereafter remaining unlawfully there with intent thereby to insult and/or annoy Mr. Mukherjee and consequently to insult and/or annoy the Complainant, has committed an offence of criminal trespass, punishable under Section 447 of I.P.C. and further that the accused had intentionally insulted Mr. Mukherjee, the Director of the Complainant and thereby gave provocation to the Complainant, intending or knowing it to be likely that such provocation would cause the Complainant to break the public peace or to commit any other offence and thereby committed the offence punishable under Section 504 of the I.P.C.

5. The complaint was signed by Mr. D. K. Chodankar, Manager, (Legal) of the Complainant.

6. Admittedly, the Complainant's Manager was not examined on oath by the learned J.M.F.C., but what the record shows is that the said Mr. Chodankar and the said Mr. Muzawar were examined in chief by Shri Ramani, the learned Counsel appearing on behalf of the Complainant and on the basis of the said examination in chief, so conducted, the learned J.M.F.C. was pleased to issue process against the accused, which Order has been impugned in this petition.

7. At the time of hearing, Shri Lawande, the learned Counsel on behalf of the accused has submitted that the learned J.M.F.C. did not examine the Complainant on oath as required by Section 200 of the Code and such non-examination has caused prejudice to the accused. Shri Lawande has further submitted that the Complainant had not placed any authority given by Chandrashekar D. Chitnis, the Secretary and General Manager of the Complainant in favour of Mr. Chodankar, who had signed the complaint. Next, it is submitted that the accused was the attorney of a share holder of the Complainant and therefore, had a right to go in the office of the said Company. Further, it is submitted that the Complainant did not examine Mr. Mukherjee, to whom annoyance is alleged to have been caused by the accused nor the Constable who had accompanied the

accused and therefore, this would be a fit case to quash the very process issued against the accused.

8. On behalf of both the parties, reliance has been placed on several authorities to which I will refer to, next, but before that to Section 200 of the Code.

9. Section 200 of the Code provides for the examination of the Complainant. It further provides that *a Magistrate taking cognizance of an offence on complaint, shall examine upon oath the Complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the Complainant and the witnesses and also by the Magistrate.*

10. In the case of ***Bharat Kishore Lal Singh v. Judhistir Modak (AIR 1929 Patna 473)***, the Full Bench of that Court held that every High Court in India has held that the omission to examine the Complainant on oath is in fact not an illegality but is merely an irregularity and being an irregularity, the next question that arises as to whether the petitioner by reason of the irregularity has been put to any substantial injustice? The

petitioner in that case was the Complainant and it was obvious that *Judhistir Modak*, who had lodged the original petition was in fact examined as the witness for the prosecution and was examined in the presence of the present petitioner and he was cross examined by the petitioner's legal adviser and, therefore, the petitioner was said to have not suffered any injustice.

11. In the case of *Ramaswami Iyengar (AIR 1922 Madras 443)*, it was held that the omission to take a sworn complaint is a serious irregularity which, in general, prejudices the Complainant.

12. In the case of *Subramania Achari (AIR 1955 Madras 129)*, a number of decisions were considered. One line of decisions laying down that the examination of the Complainant was not a mere matter of formality and when a Magistrate issues a complaint without making an examination under Section 200, the order of dismissal is illegal and must be set aside. The other line of decisions was to the effect that such omissions were merely irregularities and did not invalidate the conviction where there has been no failure of justice or any prejudice to the accused by reason of such irregularities. The Court referred to several well known

commentators on the Code. The Court referred to **G. P. Boys at page 429, Butterworth Publication, (1914)**, wherein the learned Author had stated that *“In many of the above cases, it was held that failure to examine the Complainant was a fatal error but in view of Section 537, it is difficult to see how this can be and it has been held that failure to examine the complainant is only an error of procedure which does not vitiate the proceedings unless it has caused prejudice.”* The Court also referred to Justice Sir John Woodroffe, at page 234, in his Criminal Procedure in British India, 1926 Edition, wherein he had observed that *“In some cases it has been held that failure to examine the complainant was a fatal error. But this, it is submitted, is not so. The Court will only interfere where the omission has caused prejudice. The Court also referred to Dr. Nandlal and observed that the test was : Does the error go to the whole root of trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it did not possess? Has it broken the vital rules of procedure? And if the error is of such a nature then the proceedings are vitiated in their very inception and the Section 537 has no application; but the mere fact that a certain provision of the Code is imperative, does not itself indicate that on breach of the provision, vitiates the whole proceedings.”*

13. In the case of *Mahabir Prasad v. The State (AIR 1958 Orissa 11)*, it was held that the omission to examine the complainant under Section 200 before sending the complaint for enquiry under Section 202, is a mere irregularity which does not in any way prejudice the accused and it was not an illegality. This observation was presumably made based on the Full Bench decision in *AIR 1929 Patna 473*.

14. This Court in *Vasant Waman Pradha v. Dattatraya Vithal Salvi & anr. (2003 ALL MR (Cri) 2523)*, has held that whenever a complaint is presented in the Court in view of provisions of Section 200 of the Code, which means that the Magistrate is obliged to put questions to such complainant upon oath and the substance of such examination shall be reduced to writing and shall be signed by the complainant and also by the magistrate. The word '*examination*' has been used in Section 200 of the Code which means that the Magistrate is obliged to put questions to such complainant and to elicit the answers from him. The Section enjoins a judicial duty to be performed and it requires application of judicial mind while examining such complainant on oath. The said work is not to be left to the Clerk working in such Courts. It is to be noted that when such complainant is examined on oath by Court, he is interrogated for such

examination, the truth is likely to surface because complainant knows that he is being examined on oath by the Magistrate. Complaints are generally drafted by lawyers or their Clerks at the say of the complainant and such formulated conversation is presented before the Magistrate when the complaint is filed and in that context, such examination is the best way of surfacing the truth on record and such examination, the complainant in all probability tells the truth and truthful version of the incident which enables the Magistrate to consider by application of judicial mind whether process is to be issued or not. Again, in the case of *Ms. G. J. Packaging Private Ltd & Anr. v. M/s. S. S. Sales & Anr. (2005 (6) AIR Bom R 635)*, this Court observed that for deciding whether the allegations incorporated in the complaint are well founded and whether process can be issued on the basis of such allegations, it is necessary that Magistrate should personally examine the complaint before taking a decision whether or not to issue process against the accused. This is one of the checks introduced by the legislation to ensure that adversary is not unduly harassed.

15. The object behind Section 200 of the Code is two fold. First, it is to safeguard innocent people. It is necessary for the Magistrate to satisfy himself by recording the statement on oath of the complainant and

his witnesses to find out the credibility of the complaint and take a decision thereon as regards issuance of process. In this context reference could be made to *Pepsi Foods Ltd. and Anr. v. Special Judicial Magistrate and Ors. [(1998) 5 S.C.C. 749]*, wherein it held that summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused. Second, to find out the seriousness of the offences so that if

necessary police could be ordered to investigate the same since the Code allows the Magistrate to direct the investigation and submission of report.

16. There is no doubt that although Section 200 of the Code is couched in a mandatory form nevertheless it is directory in nature being a procedural provision and to that extent non compliance of the same has got to be considered as a gross irregularity which is curable, but there is no reason why such an irregularity cannot be corrected in cases where prejudice has been caused to the accused and the accused complains about the same at the earliest opportunity. Such a view would be in tune with Section 465 of the Code. Indeed the word 'shall' in Section 200 casts an imperative duty to be performed by the Magistrate and that cannot be abdicated in favour of the advocate of the complainant. No process can be issued based on examination in chief, for it cannot be relied upon except in exceptional situations, unless it is completed by cross-examination and re-examination.

17. In the case at hand, the complainant in Para 15 of the complaint stated thus:

“The complainant submits that the accused has intentionally insulted Mr. Mukherjee, the Director of the Complainant and thereby gave provocation to the Complainant, intending or knowing it to be likely that such provocation will cause the Complainant to break the public peace or to commit any offence and thereby has committed further offence punishable under Section 504 of the I.P.C.”

The same averments in the complaint came to be repeated in the examination in chief of the Complainant and which show that:

“The accused had intentionally insulted Mr. Mukherjee, the Director of the Complainant and thereby gave provocation to the Complainant intending or knowing it to be likely that such provocation will cause the Complainant to break the public peace or to commit any other offence and thereby has committed a further offence punishable under Section 504 of I.P.C.”

18. It appears that the learned Magistrate was a silent spectator to the Complainant being examined by his learned Advocate and bringing on

record facts which were replicated from the complaint. As already stated, it was the judicial duty of the Magistrate who had himself to examine the Complainant with a view to find out the truthfulness of the allegations made in the complaint and not to have left the matter in the hands of the Advocate appearing on behalf of the Complainant. The learned Magistrate failed to take note of the fact that the Complainant was an inanimate person and could not have broken public peace even if a provocation was given to Mr. Mukherjee, the Director of the Complainant. The failure of the learned Magistrate in not examining the Complainant by himself, as to the contents of the complaint, and allowing the matter to be dealt with by the Advocate of the Complainant by examining the Complainant in examination in chief, has certainly caused prejudice to the accused which has led to process being issued against him the accused for an offence which was prima facie not made out. Since the accused has approached this Court at the earliest, the said gross procedural irregularity certainly needs to be corrected by this Court. Being so, the petition deserves to succeed on the first submission alone and the process issued against the accused deserves to be quashed and set aside with a direction to the learned J.M.F.C., to examine the Complainant and his witness/s on oath and by himself as required under Section 200 Cr.P.C. It may be reiterated

that leaving the matter of examination of the Complainant and his witness to the advocate of the Complainant, is a serious irregularity, which needs to be corrected. Consequently, the petition deserves to succeed on the first submission alone. Other submissions made on behalf of the accused to be looked into by the learned Magistrate, before issuing process. Case is remanded to the learned JMFC with a direction to follow Scrupulously the provisions of Section 200 of the Code.

19. Petition is allowed on the above terms. The order issuing process against the accused is hereby set aside. Rule is accordingly made absolute.

N. A. BRITTO, J.

arp/NH